

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4201

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BRISTOL SPRING MANUFACTURING CO.,

Respondent.

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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the certified Union and by refusing to furnish necessary and relevant information.

STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, et seq.), for enforcement of its order (A. 1) ^{1/} issued against

^{1/} "A." references are to the printed Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Bristol Spring Manufacturing Co. (herein "the Company") on August 24, 1977 and reported at 231 NLRB No. 85.^{2/} This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Plainville, Connecticut, where the Company is engaged in the manufacture, sale and distribution of precision springs, wire forms, metal stampings and related products.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union^{3/} certified by the Board as the exclusive representative of its employees in an appropriate unit, and by refusing to furnish information requested by the Union which was necessary and relevant to collective bargaining. The facts upon which the Board's findings are based are summarized below.

A. The Representation Proceeding

On January 29, 1976, the Union filed a representation petition with the Board seeking an election in a unit of production and maintenance employees at the Company's Whiting Street plant (A. 45 n. 1; 36). Pursuant to a stipulation for certification upon consent election, a secret ballot election was conducted on April 2 (A. 3, 45; 37). The tally of ballots showed a vote of 43 to 36 in favor of the Union, with 7 challenged ballots (A. 45; 38). The Company thereafter filed timely

^{2/} As the Board's order is based on findings made in a representation proceeding conducted under Section 9 of the Act, the record in that proceeding (Case No. 1-RC-14258) is part of the record before this Court pursuant to Section 9(d) of the Act.

^{3/} United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1251.

objections to conduct affecting the result of the election, alleging that the Union interfered with the election by misusing official Board documents, giving the impression that the U.S. Government and the Board supported the Union, using financial inducements to influence employees' votes, making material misrepresentations of fact, threatening employees with discharge if they failed to support the Union, and creating an atmosphere of fear and coercion (A. 3; 46-47; 40-42).

Pursuant to Section 102.69(c) of the Board's Rules and Regulations, the Regional Director conducted an administrative investigation of the objections and challenges, affording all parties an opportunity to submit evidence on the issues involved (A. 3, 45). During the investigation, the parties stipulated that one employee whose ballot was challenged was ineligible to vote because he was more allied to management than to the unit employees (A. 4 n. 2; 44). On July 22, the Director issued a Consolidated Report on Objections and Challenged Ballots in which he recommended that the challenge to that ballot be sustained, that the Company's objections be overruled in their entirety, and that the Union be certified as the bargaining representative of the unit employees (A. 3-4; 70).

The Company filed timely exceptions to the Regional Director's report and a supporting brief, reiterating its objections and requesting that the election be set aside, or, alternatively, that a hearing be held on its objections (A. 4; 80). The Company also specifically excepted to the Regional Director's failure to consider the Union's payment for a Board agent's lunch as set forth in an attached affidavit (A. 4; 82, 86). On October 6, the Board issued a Decision and Certification of Representative in which it adopted

the Regional Director's recommendations and findings and certified the Union, thereby necessarily finding that the Company did not raise any substantial or material issue requiring a hearing (A. 4; 82).

B. The Unfair Labor Practice Case

On October 12, the Union wrote to the Company requesting certain information, including the names and job classifications of the employees, their wages, hours and other current benefits (A. 9; 90). On November 22, 1976 and January 24, 1977, the Union requested that the Company bargain collectively in respect to rates of pay, wages, hours and other conditions of employment (A. 32, 92). The Company refused to furnish the requested information or to recognize and bargain with the Union (A. 9; 32). Subsequently, complaint issued on a Section 8(a)(5) and (1) charge filed by the Union, alleging that the Company's refusal to bargain with the Union and furnish relevant information was violative of the Act (A. 1). The Company answered, admitting its refusal to bargain and furnish information but contending that it had no duty to do either because the Union had been improperly certified by the Board (A. 2, 7 n. 9).

On May 12, 1977, counsel for the General Counsel filed a motion for summary judgment with the Board (A. 2; 30-35). On May 23, the Board issued an order transferring the proceeding to itself and a notice to show cause why the general counsel's motion for summary judgment should not be granted (A. 2; 25). The Company thereafter filed a response to

the show cause order, in which it contended for the first time that the Board agent who had investigated an unfair labor practice charge against the Company, filed on February 5, had been improperly assigned to investigate the Company's election objections (A. 2; 18-21).

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 24, 1977, the Board issued its decision in which it granted the General Counsel's motion for summary judgment, finding that all the issues raised by the Company in the unfair labor practice case were or could have been litigated in the prior representation proceeding (A. 5-6). Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by refusing to furnish necessary and relevant information requested by the Union (A. 9).^{4/}

^{4/} In response to a Company contention that it had no knowledge as to whether an appropriate panel of the Board considered its objections, exceptions and briefs, including material not previously considered by the Regional Director, and whether the panel properly executed the Decision and Certification of Representative, the Board noted (A. 4, n. 3):

. . . the panel that decided the instant case also decided and issued the Decision and Certification of Representative in the underlying representation case and in so doing considered the entire record, including [the Company's] objections, exceptions, and briefs. The signed copy of the Decision and Certification of Representative by the three panel members is to be found in the formal file of the representation case (1-RC-14258) located at the Board's Offices in Washington, D.C., and is available for inspection and copying and is not reported in printed volumes of Board decisions.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights (A. 12-13). Affirmatively, the order requires the Company to bargain with the Union upon request, to provide the necessary and relevant information, and to post the appropriate notices (A. 13).^{5/}

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE CERTIFIED UNION AND BY REFUSING TO FURNISH NECESSARY AND RELEVANT INFORMATION

A. The Issues Defined

The Company admittedly refused to bargain with the certified Union and furnish the information it requested, contending that the certification was invalid because (1) conduct affecting the results of the election required that the election be set aside and (2) the Company was entitled to an evidentiary hearing on its objections to the election in either the representation proceeding or in the unfair labor practice case (A. 3).

^{5/} In order to insure that the employees are accorded the services of their selected bargaining agent for the period provided by law, the Board construed the initial period of the Union's certification as beginning on the date the Company commences to bargain in good faith (A. 10). See N.L.R.B. v. Commerce Co., 328 F. 2d 600, 601 (C.A. 5, 1964), cert. denied, 379 U.S. 817; N.L.R.B. v. Burnett Construction Co., 350 F. 2d 57, 60 (C.A. 10, 1965).

It follows, if the Union was properly certified by the Board, that the Company's refusal to bargain and furnish information violated Section 8(a)(5) and (1) of the Act. Polymers v. N.L.R.B., 414 F. 2d 999, 1001 (C.A. 2, 1969), cert. denied, 396 U.S. 1010; Prudential Insurance Co. v. N.L.R.B., 412 F. 2d 77 (C.A. 2, 1969), cert. denied, 396 U.S. 928.

The primary issue presented with respect to the propriety of the Union's certification is whether the Board acted within the "wide degree of discretion" (N.L.R.B. v. A.J. Tower Co., 329 U.S. 324, 330 (1946)) entrusted to it by Congress in resolving questions arising during the course of the representation proceeding. As this Court has stated, "The conduct of representation elections is the very archetype of a purely administrative function, with no quasi about it, concerning which courts should not interfere save for the most glaring discrimination or abuse." N.L.R.B. v. Olson Bodies, 420 F. 2d 1187, 1189 (C.A. 2, 1970), cert. denied, 401 U.S. 954. Thus, "the presumption is that ballots cast under the safeguards provided by Board procedure reflect the desire of the participating employees." N.L.R.B. v. Zelrich Co., 344 F. 2d 1011, 1015 (C.A. 5, 1965). It is, therefore, settled law that representation elections are not lightly to be set aside, that the burden of showing grounds for doing so is on the party seeking to overturn the election, and that the burden is a heavy one, requiring the objecting party to show not only that

improprieties occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the election results. N.L.R.B. v. Mattison Machine Works, 365 U.S. 123, 124 (1961); Polymers, Inc. v. N.L.R.B., supra, 414 F. 2d at 1001; N.L.R.B. v. Millard Metal Service Center, Inc., 472 F. 2d 647, 649-650 (C.A. 1, 1973). And, since the determination of whether or not an election will be set aside also rests in the first instance with the Board, its determination will not be reversed, except for an abuse of discretion. N.L.R.B. v. Millard Metal Service Center, Inc., supra, 472 F. 2d at 650; N.L.R.B. v. O.S. Walker Company, Inc., 469 F. 2d 813, 817 (C.A. 1, 1972).

B. The Board Properly Overruled the Objections

1. The alleged misuse of government documents

In its first objection, the Company contended, in part, that the Union interfered with the election by reproducing official Board documents in its campaign literature, by indicating through other documents the manner in which employees were to mark ballots, and by defacing official notices of election (A. 46; 40-41). The standard for assessing such alleged misconduct was enunciated by the Board in Allied Electric Products, 119 NLRB 1270 (1954). In that case, the union distributed a facsimile of an official Board ballot with an "X" marked in the "yes" box, a large "YES" printed alongside and an additional statement, "Do not mark it in any other way--Mark 'YES' box only." Id. at 1271. The Board set

aside the election "in order to preserve an atmosphere of [governmental] impartiality," stating that it would not permit use of an official Board document by private parties unless the document was "completely unaltered in form and content and clearly marked sample on its face." Id. at 1271-1272.

Similarly, in Rebmar, Inc., 173 NLRB 1434 (1968), the Board found objectionable a union handbill which reproduced part of a Board election notice underneath a statement that "[t]he government protects your right to organize yourself in a union." On the reverse side, the handbill contained an explanation, in broad general language, of what a union is, how it functions and what a collective bargaining contract contains. The union was not identified by name anywhere on the handbill. The Board found that the election notice was altered in such a manner as to reasonably cause the employees to believe that the Board endorsed the union's campaign.

As the Board has emphasized, however, it did not intend in these decisions "to adopt a per se rule which would apply . . . under all circumstances regardless of possible impact on the voters." Vernon Convalescent Center Co., 194 NLRB 439 n. 2 (1971). Thus, the Board has, with court approval, refused to set aside an election on the basis of a leaflet containing a simplified ballot that did not resemble the official Board ballot and therefore could not indicate a Board endorsement of an election participant (N.L.R.B. v. Clarytona Manor, Inc., 479 F. 2d 976, 978-981 (C.A. 7, 1973)). The Board has also found unobjectionable a leaflet containing a facsimile of the voting boxes of the Board's official ballot with arrows pointing to an "X" marked in a box under the union's name, but with no other portion of the ballot reproduced and

with no other reference to a Board ballot (Phelps-Dodge Copper Products Corp., 111 NLRB 950 (1955)); a pictorial explanation of the mechanics of a Board election, including a representation of a Board ballot, which the Board found did not convey Board approval of any party to the election (Rett Electronics, Inc., 169 NLRB 1111 (1968)); and a reproduction of substantial portions of the Board's official notice of election and sample ballot which omitted the phrase "Official Sample Bailot" and all references to the U.S. Government, the Board, or the Board's agents (Paula Shoe Co., Inc., 121 NLRB 673 (1968)). In sum, as these cases show, the Board will set aside an election only where the material distributed is a replica or close facsimile of an official Board document, so altered to give the appearance of favoring one of the parties to the election and tending to mislead its recipients to believe that the document was approved, produced by, or had the official sanction of the Board.

In the instant case, the investigation disclosed that the Union's campaign literature included (1) an unaltered copy of a Board notice to employees which is normally furnished to employers for voluntary posting when representation petitions are filed, (2) an unaltered copy of a notice of election, involving the employees of a completely different employer, which was stamped by the Union with its date of receipt two years earlier, and (3) a leaflet which stated that Bureau of Labor Statistics' figures showed that union members make 30% more than non-union employees (A. 47; 71-73). There was no evidence that the latter leaflet contained a misrepresentation of fact. Thus, as the Regional Director found, the mere use of such materials was clearly unobjectionable under the Allied Electric Products rule /

The investigation further disclosed that on March 10, 18 and 22, the Union issued campaign leaflets which contained instructions to voters to "vote yes" (A. 51-52; 74-77). Next to or under the word "yes" was a marked voting box (A. 51-52; 74-77). Two of the leaflets contained references to the U.S. Government, but the Union was clearly identified as the author of the leaflets (A. 53; 74, 76). None of the leaflets contained actual reproductions of the official Board ballot (A. 52; 74-77). The Regional Director properly concluded that there was nothing in these leaflets which would cause employees to view them as official government publications or believe that the U.S. Government or the Board endorsed a particular choice on the ballot (A. 53).

Additionally, the investigation revealed that two of the three official notices of election posted in the plant were repeatedly defaced by the insertion of x marks in the "yes" squares of the sample ballots (A. 52). There was no evidence that the Union was responsible for, or even knew of, the defacement of the notices (A. 52). The Regional Director properly concluded that "conduct not attributable to the opposing party [could] not be relied upon to upset an election." Bush Hog, Inc. v. N.L.R.B., 420 F. 2d 1266, 1269 (C.A. 5, 1969).

2. The alleged improper references to the Board and its agents

The Company further contended in its first objection that the Union made improper references to the Board and its agents which conveyed the impression that the government endorsed the Union's campaign (A. 46, 48; 40). Here, the investigation disclosed that on February 5, 1976, seven days after the filing of the representation petition, the Union filed a Section 8(a)(3) and (1) charge against

the Company (A. 48 n. 4). On February 23, the Union distributed a letter to the employees, stating that Company President Hittleman "threatened, fired and tried to scare the workers [but that it was] not going to work because workers are protected by U.S. Laws" (A. 48). The letter further stated (A. 48):

The Union filed Unfair Labor Practice Charges against Mr. Hittleman on behalf of the fired employees. We expect to win these cases and get all backpay and benefits lost. An agent of the National Labor Relations Board from Boston has been here and has been getting information about the illegal discharges of workers.

On March 3, following the filing of an amended unfair labor practice charge, the Union stated in another letter to employees that it had "filed unfair labor practices against Mr. Marty Walsh, who is an agent of Ben Hittleman and the Company" (A. 48). Finally, on March 10, the Union issued a leaflet which outlined reasons why "Women Who Work in Industry Need the UAW" (A. 48; 74). The leaflet concluded with the statement (A. 74):

WHAT YOU HAVE READ HERE IS TRUE AND ARE FACTS AND ARE GUARANTEED BY THE UAW AND/OR THE UNITED STATES GOVERNMENT . . . IF YOUR FOREMAN TELLS YOU THAT YOU CAN LOSE ANY OF THE BENEFITS YOU NOW HAVE BY VOTING FOR THE UNION, TELL HIM TO PUT IN WRITING, LIKE THE UAW HAS.

The Regional Director concluded (A. 53) that these documents could not reasonably have caused the employees to believe that the Board endorsed the Union's election campaign since they merely purported to set forth the the Union's version of the facts and law in the unfair labor practice case

were therefore readily susceptible to evaluation on that basis by the employees.^{6/} Indiana Rock Wool Division Susquehanna Corp., 201 NLRB 137, 138 (1973). See also, Vernon Convalescent Center Co., supra, 194 NLRB 439 and other cases cited supra, pp. 9 and 10.

3. The alleged improper payments to employees

In its first and third objections, the Company further contended that the Union made improper payments to employees who gave statements to the Board in connection with the unfair labor practice charges, thereby conveying the impression that the Board supported the Union in the election and influencing their votes (A. 51). "The Board has approached the problem of gifts or payments by labor or management on a pragmatic basis, based on the broad standard of whether the payment was intended to or would influence the election and thus impair a free choice on the part of the employees." N.L.R.B. v. Commercial Letter, Inc., 455 F. 2d 109, 111 (C.A. 8, 1972), remanding 188 NLRB 827 (1971), quoted approvingly on remand, 200 NLRB 534, 542 (1972), enf'd 496 F. 2d 35 (C.A. 8, 1974). Thus, the Board recognizes, of course, that unreasonable or excessive economic inducements are impermissible during an election campaign because they tend to influence votes without regard to the merits of the election. See, for example, General Cable Corp., 170 NLRB 1682 (1968) (Election set aside because union gave \$5 gift certificates to all unit employees); Wagner Electric Corp., 167 NLRB 532 (1967) (Election set aside because union provided free life

^{6/} There was no contention herein that the Union's charges were frivolous or merely designed to place the Company at a disadvantage vis a vis the election. Complaint issued on April 6, 1976 and the Company entered into a settlement agreement in August 1977 (A. 68 n. 17).

insurance coverage to all employees who joined); Teletype Corp., 122 NLRB 1594 (1959) (Escalating payments by two unions competing for attendance at meetings found objectionable).

Conversely, not all economic inducements are deemed to interfere with the employees' free choice. "Payments to election observers, expense reimbursements to car pool drivers who transport voters and payments of 'lunch money' to employees who attend pre-election meetings have all been upheld in the absence of a showing that such payments were excessive or were conditioned upon how the employees voted. Shoreline Enterprises of America, 114 NLRB 716 (1955); Federal Silk Mills, 107 NLRB 876 (1954); Jat Transportation Co., 131 NLRB 122 (1961)." N.L.R.B. v. Commercial Letter, Inc., supra, 455 F. 2d at 116 n. 2. (Judge Lay concurring). See also, N.L.R.B. v. Basic Wire Products, Inc., 516 F. 2d 261, 264-265 (C.A. 6, 1975) (\$20 payment after the election for expenses while attending pre-election conferences and for time lost serving as an election observer were not unreasonable). N.L.R.B. v. Commercial Letter, Inc., supra, 496 F. 2d at 37 (payments to 12 employees subpoenaed to a representation case hearing for lost wages were not objectionable). Similarly unobjectionable were raffles, door prizes and gifts of negligible value used for encouraging attendance at pre-election meetings. Hollywood Plastics, Inc., 177 NLRB 678 (1969); Jacqueline Cochran, Inc., 177 NLRB 837 (1969); Bordo Products Co., 119 NLRB 79 (1957).^{7/}

^{7/} Cf. Plastic Masters, Inc. v. N.L.R.B., 512 F. 2d 449 (C.A. 6, 1975) (Election set because employee was paid about twice his normal earnings for serving as a union election observer); Collins & Aikman Corp. v. N.L.R.B., 383 F. 2d 722 (C.A. 4, 1967) (Election set aside where an employee was promised more than seven times his regular pay for serving as a union observer).

It is thus clear, the mere fact that a union makes payments to employees does not, in and of itself, require that an election be set aside.

In the instant case, the investigation disclosed that the Union made payments to employees on two separate occasions. Initially, payments of \$5 dollars were made to five employees who gave affidavits to the Board agent investigating the Union's unfair labor practice charge (A. 50). Two of the employees met with the Board agent during their lunch hour on February 19 and the other three were interviewed at the end of their shifts (A.49). None of the five knew, at the time they agreed to furnish affidavits, that they would receive any money from the Union (A. 49). The payments were roughly equivalent to the employees' hourly pay, based on piecework rates, of about \$4. (A. 59 n. 12). At least two of the employees remaining after work lost wages that they would have received from other employers for whom they worked part-time (A. 49).

Subsequently, after filing an amended unfair labor practice charge, the Union arranged for four employees to give affidavits to the Board after work on March 3 (A. 50). Due to a confusion about the date of the meeting, the Board agent was not present and the employees spent one and a half to two hours preparing statements for Union Representative Bracha to present to the Board (A. 50, 51). Two of the four employees had previously given affidavits to the Board and received \$5 payments, but had no other reason to believe that they would be compensated for their time (A. 50). The other two were unaware, prior to the time that Bracha took their statements, that they would receive any compensation (A. 50). After one of these latter employees completed her statement, Bracha said something about paying her "for overtime" in the amount of \$5 (A. 50). Bracha also told her that the Union would pay for anything the employees wanted at the local diner. Two days later, assertedly because of a clerical error, each of these four employees received checks for \$20 (A. 51, 60).

On the basis of the foregoing facts, the Regional Director found that all payments to the employees could best be described as "a simple commercial transaction--a temporary exchange of the employee's time (albeit, not necessarily scheduled working time) on behalf of the [Union], without additional commitments or conditions and at a rate roughly comparable to or at least not "grossly disproportionate" to the wages the employee earned elsewhere: a quid pro quo (A. 61). With respect to the \$20 payments, the Director stated as follows (A. 60):

I am persuaded by all the facts that the excessive payment of \$20.00 to four employees was, as the [Union] contends, an "honest mistake" on the part of the employees in the [Union's] office. In reaching this conclusion, I rely on the evidence of one of the second set of witnesses, the only one to whom the [Union's] representative made any specific reference of compensation at that time, to the effect that the representative indicated that the compensation "would probably be around five dollars." Additionally, I rely on other expense vouchers furnished by the [Union] which show that the "traditional" compensation rate was \$5.00 or \$5.00 per hour. Additionally, there is no evidence that the [Union's] representative became aware of the "overpayment" until after the election was conducted, and, therefore, I cannot condemn the [Union's] failure to somehow vitiate the effects of the overpayment. Even aside from those factors, however, I would not find that the payments were so "grossly disproportionate" as to warrant sustaining the Objection. Quick Shop Markets, Inc., 200 NLRB 830 and 204 NLRB 1150, enf'd. 492 F. 2d 1248 (C.A. 8, 1974).

Accordingly, since the investigation revealed that the payments were not conditioned on the outcome of the election, the employees' votes, the substance or worth of their testimony, or the eventual decision to issue complaint on the unfair labor practice charges, the Director concluded that the element of "bribery" was not present and that the payments did not interfere with the election results (A. 60-61). Similarly, absent any evidence that employees, including those who received the payments, had reason to believe that the Board condoned, ratified or sponsored these payments, the Director reasonably rejected the contention that the payments caused employees to believe that the Board supported or approved of the Union's election campaign (A. 53).^{8/}

^{8/} The Company's third objection was also based on statements by the Union representatives that, in the event of a strike, the Union would pay employees' mortgage payments or rents (A. 611). The Company contended that these statements constituted unlawful economic inducements. However, it is well settled that promises of future strike benefits are not unlawful economic inducements. ITT Blackburn Co. v. N.L.R.B., 554, F. 2d 58, 59 (C.A. 8, 1976); N.L.R.B. v. Muscogee Lumber Co., Inc., 473 F. 2d 1364, 1367 (C.A. 5, 1973). They represent, at most, protection against possible economic burdens of a strike situation and can have no greater effect than to lessen the extent to which the possibility of other financial burdens imposed by a strike may discourage employees from supporting a union. N.L.R.B. v. Muscogee Lumber Co., Inc., supra, 473 F. 2d 1367.

4. The alleged misrepresentations

In its second objection, the Company alleged that the Union made substantial misrepresentations of fact which improperly influenced the employees' freedom of choice. In assessing pre-election campaign propaganda by both employers and unions, the Board recognizes that "the right of the parties to wage a free and vigorous campaign" is directly related to "the right of the employees to an untrammelled choice." Hollywood Ceramics, Inc., 140 NLRB 221, 224 (1962). Accordingly, the Board does not, as a general rule, "police or censor propaganda used in the elections it conducts, but rather, leaves to the good sense of the voters the appraisal of such matters, and to the opposing parties the task of correcting inaccuracies and untruthful statements." Linn v. United Plant Guard Workers, 383 U.S. 53, 60 (1966), quoting from Stewart-Warner Corp., 102 NLRB 1153, 1158 (1953). See also, Letter Carriers v. Austin, 418 U.S. 264, 272 (1973). "Thus," as the Board has said, "exaggerations, inaccuracies, partial truths, name-calling and falsehoods, while not condoned, may be excused as legitimate

propaganda, provided that they are not 'so misleading' as to prevent the exercise of a free choice by employees in the selection of their bargaining representative." United Aircraft Corporation, 103 NLRB 102, 104 (1953), quoting from Kearney & Trecker Corporation, 96 NLRB 1214 (1951).

Where, however, the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desire, of the employees cannot be determined in an election, the Board will intervene to set the election aside. This has been held to be the case where (1) there is a misrepresentation or other similar campaign trickery involving a substantial departure from the truth, and (2) such misrepresentation is so timed as to prevent the other party from making an effective reply, comes from a party who has special knowledge of the true facts, and relates to matters not within the independent knowledge of the employees, so that they are unable to evaluate the propaganda. Hollywood Ceramics Company, ^{9/} supra, 140 NLRB at 224. Accord: N.L.R.B. v. O.S. Walker Company, Inc., 469 F. 2d 813, 817; Lipman Motors, Inc. v. N.L.R.B., 451 F. 2d 823, 825 (C.A. 2, 1971); Bausch & Lomb, Inc. v. N.L.R.B., 451 F. 2d 873, 876 (C.A. 2, 1971).

^{9/} Subsequent to its decision herein, the Board overruled Hollywood Ceramics, holding that elections will no longer be set aside solely on the basis of misleading campaign statements, unless they amount to deceptive practices improperly involving the Board and its processes or the use of forged documents which make it impossible for the voters to recognize the propaganda for what it is. Shopping Kart Food Market, Inc., 228 NLRB No. 190, 94 LRRM 1705 (1977). Because, as shown supra, the alleged misrepresentations in this case are not grounds for setting aside the election even under the Hollywood Ceramics standard, it is unnecessary for the Court to consider the new, less restrictive standard announced by the Board in Shopping Kart, which places greater reliance on the voters' ability to evaluate campaign propaganda for themselves.

In the instant case the Company complained of four alleged misrepresentations on the part of the Union. First, the Company alleged that a Union representative stated at a pre-election meeting that employees of another local employer earned in excess of \$6.00 per hour (A. 54). The Union presented evidence that the average hourly rate of these other employees was \$6.09, excluding overtime and premium payments (A. 55). No evidence was presented that the statement was false (A. 55).

Second, the Company alleged that the Union falsely stated that 19 former employees were involuntarily terminated when, in fact, only eight of these employees had been discharged (A. 55). This alleged misrepresentation was contained in a leaflet dated March 30 which first quoted from letters sent to the Union by former Company employees and then asked "Remember the letter that the Company sent you a while back when they bragged that they had never laid off anyone? What ever happened to ??????" (A. 55). The leaflet then listed the names of 19 former employees and continued, "Think about all the friends who at one time worked with you but are no longer there. Did they quit?? Did they get fired??" (A. 55). As the Regional Director stated, it was "debatable" whether any representation at all was made in this leaflet, since it merely questioned whether or not these employees were fired or were voluntarily terminated (A. 56). Moreover, even assuming that the Union had set forth an unequivocal claim that all of the named employees had been involuntarily terminated, that would not have constituted so flagrant or substantial a misrepresentation as to impair the integrity of the

election, particularly since the facts were not within the special knowledge of the Union and the leaflet could be independently evaluated by the employees.

Third, the Company alleged that statements made at Union meetings and in Union campaign literature led employees to believe that selecting the Union as their bargaining representative guaranteed job protection and continuation of existing benefits (A. 56-57). The investigation disclosed that, at the January 23 Union meeting and at subsequent meetings, employees raised the question of whether the Company could close the plant at will. Union representative Bracha responded that "the law" prevented the Company from doing so and that "there was no way in hell that he (Company President Hittleman) could close the plant" (A. 56, 57). Bracha also told employees that, if the Union were voted in, the Company could not withdraw existing benefits (A. 56).

The investigation further disclosed that on February 23 the Union distributed a letter stating in part (A. 57):

"And . . . don't let anyone try to kid you--

"1. The company cannot--by law--close up the plant when you want to have your own union. ,

"2. The company cannot—take away any of the few benefits you now have, such as bonuses, holidays, vacations, etc.

"3. AND THE COMPANY ISN'T TELLING YOU THE TRUTH IF THEY SAY THEY CAN DO THE ABOVE."

additionally Union letter of March 3 stated, "The low wages, out-of-date benefits and the cutting of piece work rates will not be changed without a strong membership and union to back up every worker" (A. 56 N. 8).

The Union's March 10 leaflet entitled "Women Who Work in Industry Need the UAW," stated, "A UNION CONTRACT will mean that the company cannot cut your piece work prices anytime they want to" (A. 56 m. 8).

The investigation also disclosed that at Company preelection meetings with employees, Company President Hittleman stated that he could close the plant if he wanted to, but that he did not want to do so (A. 56-57). Hittleman further stated with respect to existing benefits that "nothing was guaranteed until he put his name to the contract" (A. 57). In the totality of these circumstances, the Regional Director reasonably concluded that the Union's statements amounted to nothing more than the usual campaign propaganda, that they could be readily evaluated by the employees, that the Company had an opportunity to and did respond, and that the extended debate between the parties on these issues precluded setting aside the election on this ground (A. 56-57).

Finally, the Company contended that the Union misrepresented the employees' obligation to pay assessments as members of the Union (A. 58). In support of its contention, it produced dues authorization cards which stated that the Union was authorized to enter into contracts with employers which provided for the deduction or collection of "dues, fees, assessments or other contributions" payable to the Union (A. 58-59). The investigation disclosed that the Union's current international

constitution did not authorize it to levy assessments (A. 59). Moreover, the Company conceded that, prior to the election, the Union distributed combination membership and dues authorization cards which did not refer to assessments (A. 58) n. 10). On such facts, the Regional Director reasonably concluded that there was no evidence that any of the Union's statements to the employees were false (A. 59).

5. Alleged threats of retaliation or discharge

The Company's fourth objection alleged that the Union threatened employees with retaliation or discharge if they did not join the Union. (A. 65). In support of its objection, the Company presented one employee who stated that at a Union meeting, apparently held on January 23, he asked Union Representative Bracha what would happen if he did not want to join the Union and Bracha responded "You'll have to find a new job." (A. 65). The employee further stated that he reported the incident to Company President Hittleman who assured him that as long as he worked for the Company, he would not have to belong to a union (A. 65 n. 14).

No other employee presented by the Company during the investigation was able to corroborate the above-quoted employee statement (A. 65). None testified to having been similarly threatened or to ever having heard such a threat (A. 65). All stated, as did Bracha, that at this and other meetings Bracha merely explained the obligations of employees in a union shop (A. 65). Accordingly, the Regional Director concluded that the preponderance of the evidence indicated that the employee had misunderstood Bracha's remarks (A. 66). The

Director further concluded, even assuming, arguendo, that Bracha made the remark attributed to him by the witness, such conduct would not warrant setting aside the election because it was an isolated occurrence and the employee had his fears, if any, allayed by President Hittleman (A. 66).^{10/} See, for example, N.L.R.B. v. Sumter Plywood Corp., 535 F. 2d 917, 924 (C.A. 5, 1976) cert. denied 429 U.S. 1092; Fones v. N.L.R.B., 431 F. 2d 417 (C.A. 5, 1970).

During the investigation the Company also provided a statement by Company President Hittleman that a former employee was threatened with discharge by other employees who told him that "he had to join the Union if he wanted to stay here because they were definitely going to have a union in here" (A. 66). The former employee, who worked for the Company from March 1 to 5, denied that such threat was made, explaining that he was merely told that he would not be eligible to vote in the election because of his hiring date (A. 66). The two employees "suspected" by the Company of having made the statement, similarly denied that it had been made (A. 66). Thus, as the Regional director found, there was insufficient evidence to support the Company's allegation. Moreover, even if this were not so, employee threats which

^{10/} If, as the Regional Director found, the alleged threat was made at the January 23 meeting, it would not, in any event, have been objectionable since it pre-dated the filing of the election petition. Independent, Inc. v. N.L.R.B., 406 F. 2d 203, 207 (C.A. 5, 1969); N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26, 30-31 (C.A. 5, 1969).

were not condoned or ratified by the Union would not provide a basis for setting the election aside. Fones v. N.L.R.B., supra, 431 F. 2d at 417.

Finally, the Company presented an employee who stated that she attended a Union meeting after the election at which "the Union representatives" stated that "we could be fired for not signing" a Union card (A. 66). The employee further related,

[T]hey kept on talking about how it would be unfair for the other members to be paying dues for their protection but us not paying dues. They used the term 'union shop' and one of the Union men said that once it was a union shop most of the employees who hadn't signed a membership card would have to or should sign a membership card, for their protection (A. 67).

The Regional Director reasonably concluded that it was clear that these statements were permissible references to the legal effects of a union security provision (A. 67). In any event, the discussion occurred after the election and could not have affected the employee's vote.

6. Atmosphere of fear, restraint and coercion

In its last objection, the Company alleged that the Union created an atmosphere of fear, restraint and coercion which interfered with the election (A. 47). No additional evidence was submitted in support of the objection except for a statement from one employee that an alleged discriminatee, Francis Roberts, campaigned within the polling area when he came to vote (A. 67). The employee, who "escorted" Roberts to and from the polling place, stated that, as Roberts was leaving, he stopped and conversed, for about 15 seconds, with an employee waiting in line to vote

and failed to obey the "escorter's" request that Roberts "move out" (A. 67). The employee to whom Roberts spoke stated during the investigation that Roberts said "hello" to her and then remarked that he would see her the following week at the social club to which they both belonged (A. 67). Another employee with whom Roberts also spoke briefly stated that he and Roberts only exchanged "hellos" and that there was no further conversation (A. 67). Plainly, such brief, innocuous conversations not involving agents of either party, fall far short of improperly electioneering at the polling place, in contravention of the rule formulated by the Board in Milchem, Inc., 170 NLRB 362 (1968). N.L.R.B. v. Newton-New Haven Company, 506 F. 2d 1035, 1037 (C.A. 2, 1974); N.L.R.B. v. Bostik Division, USM Corporation, 517 F. 2d 971, 976 (C.A. 6, 1975); N.L.R.B. v. Caravelle Wood Products, Inc., 466 F. 2d 675, 679 (C.A. 7, 1972). As the Board stated in Milchem, Id. at 363:

[That rule] does not mean that any chance isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election, We will be guided by the maxim that "the law does not concern itself with trifles."

Accordingly, the Regional Director properly overruled the objection.

C. The Board Was Not Required to Hold a Hearing
on the Company's Objections to the Election

Finally, the Company contends that the Board was required to hold a hearing on its objections either in the representation proceeding or in the unfair labor practice case. However, it is settled law that parties asserting objections following a representation election have a right to an adversary hearing only where "substantial and material factual issues" exist. Board Rules and Regulations, Series 8(29 C.F.R.), Section 102.69(c). To raise such issues, it is incumbent upon the

party who seeks a hearing to supply the Board with specific evidence which prima facie would warrant setting aside the election. Polymers, Inc. v. N.L.R.B., supra, 414 F. 2d at 1004; N.L.R.B. v. O.S. Walker Company, Inc., supra, 469 F. 2d at 818. "Objections which merely question the interpretations, inferences and legal conclusions reached from undisputed facts by the Regional Director fall short of meeting this standard." Baumritter Corp. v. N.L.R.B., 386 F. 2d 117, 120-121 (C.A. 1, 1967). See also Lipman Motors, Inc. v. N.L.R.B., supra, 451 F. 2d at 827. Moreover, this qualified right to a hearing satisfies all statutory and constitutional requirements and is "not only proper but necessary to prevent dilatory tactics by employers or unions disappointed in election returns." N.L.R.B. v. Joclin Mfg. Co., 314 F. 2d 627, 632 (C.A. 2, 1963).

In the instant case, the Company's exceptions to the Regional Director's report failed to demonstrate the existence of any substantial and material issues requiring a hearing. The Company took issue with the Director's inferences and conclusions but raised no dispute as to the underlying facts. Moreover, while the Company also excepted to the Regional Director's "failure to consider . . . the action of a Board Agent in accepting the gratuity of a lunch paid for by the Union" (A. 81), that exception was based upon an affidavit in which an employee stated as follows (A. 86):

1. On February 19, 1976 I was in the plant on lunch hour when someone said Francis Roberts wished to see me. I went out and Roberts asked me if I would go to the Union Hall in Plainville and make a statement. He said, "Don't worry about lunch, we will take care of it."

2. I went to the Union Hall and met Tony Bracha, Fran Roberts and the lawyer from the Labor Board and other employees. The lawyer took me and sat me down and started to ask me questions. We were all in a group together. The lawyer wrote up a statement and I signed. While we were preparing my statement, Fran Roberts took orders for lunch and went out and picked up the food. He returned and we all ate together.

In these circumstances, even accepting as true the Company's contention that the Union actually paid for the Board agent's lunch, the Board could reasonably conclude that the matter was de minimis and that no prejudice to the election resulted. See, for example, N.L.R.B. v. Athbro Precision Engineering Corp., 423 F. 2d 573 (C.A. 1, 1970) (Board agent drank beer in a cafe with a union representative during recess between voting periods); N.L.R.B. v. National Plastics Co., 175 F. 2d 755, 757-758 (C.A. 4, 1949) (Board agent in charge of an election accepted a ride to and from the plant with the Union representative); Amax Aluminum Extrusion Products v. N.L.R.B., 421 F.2d 394, 395 (C.A. 5, 1970) (Board agent fraternized with union organizers). As this Court has stated, "[I]f speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained." Polymers v. N.L.R.B., supra, 414 F. 2d at 1004. Accord: N.L.R.B. v. Captain Drilling Co., 408 F. 2d 676, 677 (C.A. 5, 1969). Moreover, since the facts underlying the Company's request for review stood admitted, no hearing was necessary because "a hearing apparently would not deal with matters of factual proof but would serve only to permit argument which could as well have been presented in the writing itself." N.L.R.B. v. J.R. Simplot Co., 322 F. 2d 170, 172 (C.A. 9, 1963). Accord: N.L.R.B. v. Difco Laboratories, Inc., 389 F. 2d 663, 667 (C.A. 6, 1968), cert. denied, 393 U.S. 828.

Thereafter in the unfair labor practice case, the Company contended that the election should be set aside because the same Board agent who investigated the pre-election unfair labor practice charge against the Company was assigned to investigate the election objections in the representation case. "It is well settled that absent a showing that such evidence was discovered or that special circumstances prevented the Company from raising the question earlier, a respondent in a Section 8(a)(5) proceeding is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. Magnesium Casting Co. v. N.L.R.B., 401 U.S. 137, 141 (1971); Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Lipman Motors, Inc. v. N.L.R.B., supra, 451 at 828. No such showing was made here.

In any event, there was nothing prejudicial in respect to the Board agent's dual role. In the first place, the Board's well established policy, stated in its field manual and approved by the Courts, provides that an unfair labor practice charge of the type filed here does not "block" an election if the charging party agrees to proceed. Louis-Allis Co. v. N.L.R.B., 463 F. 2d 512, 516 (C.A. 7, 1972. This policy recognizes that it is more likely that a union, rather than an employer, will be prejudiced if an election is held during the pendency of a charge alleging employer interference with rights guaranteed to employee under the Act. Secondly, the

Board agent's involvement in the unfair labor practice case was at the pre-complaint stage, where his role was investigatory rather than adversary and therefore non partisan in nature (A. 6, 48 n. 4). The Company made no showing that the agent's investigation of the objections was, in fact, prejudiced in any way by his investigation of the unfair labor practice charges (A. 6). Moreover, no such contention was made with respect to the Board agent who conducted the election. Finally, since the Board accepted the factual basis of the contention as true, the Company showed no grounds for requiring a hearing.

In sum, the Company admitted its refusal to bargain with the Union and to furnish relevant and necessary information in order to obtain judicial review of the Union's certification. The Company's exceptions to the Regional Director's report raised no factual issues which could be clarified at a hearing, but merely questioned the inferences, interpretations and conclusions of the Regional Director. Similarly, in the unfair labor practice case, the Company raised no issues which could not have been litigated in the underlying representation case or would have warranted setting aside the election or granting a hearing. In these circumstances, there was nothing to hear and the Board properly granted summary judgment.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that the Board's order should be enforced in full.

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February 1978.

UNITED STATES COURT OF APPEALS

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
BRISTOL SPRING MANUFACTURING CO.,
Respondent.

No. 77-4201

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 9th day of February, 1978